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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-863

WILLIAM HOZIE,

Petitioner,

v.

MARY HOZIE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the Court of Appeal of the
State of California, First Appellate District

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The petitioner, WILLIAM HOZIE, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeal of the State of California, First Appellate District, Division Four, and Numbered therein 1 Civil No. 31,450.

OPINION BELOW

The opinion of the Court of Appeal of the State of California, First Appellate District, is attached as Appendix

A to this petition. On September 26, 1973, the Supreme Court of the State of California filed an Order denying a hearing. Said order was made without any opinion.

JURISDICTION

The judgment of the Court of Appeal of the State of California was filed August 3, 1973. Pursuant to California Rules of Court, Rule 24(a), that judgment became final 30 days thereafter.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

Whether an award of permanent alimony (now referred to in California as "spousal support") is an unlawful taking of property contrary to the due process clause of the United States Constitution, Amendment XIV, Section 1.

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

United States Constitution, Amendment XIV, Section 1, provides in part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTES

California Civil Code §4506:

"A court may decree a dissolution of the marriage or legal separation on either of the following grounds, which shall be pleaded generally:

(1) Irreconcilable differences, which have caused the irremediable breakdown of the marriage.

(2) Incurable insanity."

California Civil Code §4509:

"In any pleadings or proceedings for legal separation or dissolution of marriage under this part, including depositions and discovery proceedings, evidence of specific acts of misconduct shall be improper and inadmissible, except where child custody is in issue and such evidence is relevant to that issue, or at the hearing where it is determined by the court to be necessary to establish the existence of irreconcilable differences."

California Civil Code §4801:

"(a) In any judgment decreeing the dissolution of a marriage or a legal separation of the parties, the court may order a party to pay for the support of the other party any amount, and for such period of time, as the court may deem just and reasonable having regard of the circumstances of the respective parties, including the duration of the marriage, and the ability of the supported

spouse to engage in gainful employment without interfering with the interests of the children of the parties in the custody of such spouse. The court may order the party required to make such payment of support to give reasonable security therefor. Any order for support of the other party may be modified or revoked as the court may deem necessary, except as to any amount that may have accrued prior to the date of the filing of the notice of motion or order to show cause to modify or revoke. The order of modification or revocation may be made retroactive to the date of filing of the notice of motion or order to show cause to modify or revoke, or to any date subsequent thereto.

(b) Except as otherwise agreed by the parties in writing, the obligation of any party under any order or judgment for the support and maintenance of the other party shall terminate upon the death of either party or the remarriage of the other party.

(c) When a court orders a person to make specified payments for support of the other party for a contingent period of time, the liability of such person terminates upon the happening of such contingency. If the party to whom payments are to be made fails to notify the person ordered to make such payments, or the attorney of record of such person, of the happening of such contingency and continues to accept support payments, such party shall refund any and all moneys received

which accrued after the happening of such contingency, except that such overpayments shall first be applied to any and all support payments which are then in default. The court may, in the original order for support, order the party to whom payments are to be made to notify the person ordered to make such payments, or his attorney of record, of the happening of such contingency.

(d) An order for payment of an allowance for the support of one of the parties shall terminate at the end of the period specified in the order and shall not be extended unless the court in its original order retains jurisdiction."

STATEMENT OF THE CASE

Mary and William Hozie were married in June 1967 and separated less than two years later in May, 1969. There are no children of the marriage.

California passed a "no fault" type of divorce law, effective January 1, 1970. Prior to that time, and at the time of the marriage of these parties, California's old divorce laws provided for the granting of divorce upon grounds of extreme cruelty, adultery, etc. Under a divisible divorce theory, referred to below, a divorce could be granted to either or both parties, but the granting of a divorce was a *sine qua non* to receive an award of alimony.

Under the new divorce law, the old grounds for divorce were removed and the only grounds for divorce (now called "dissolution of marriage" in California) are irreconcilable differences and incurable insanity. Fault no longer has any

bearing upon the proceedings, including an award of alimony. Indeed, evidence of specific acts of misconduct is not even admissible.

Mary Hozie filed for dissolution of marriage in July, 1970. The matter came to trial in March, 1971. At that time she was 23 years old, childless, had a part time job earning $400 per month plus overtime, typed 70-75 words per minute, took shorthand, and had also previously worked for a bank. There was no testimony to indicate that she could not work or that she could not support herself.

Mary received community property worth $10,000. The court also ordered Bill to pay her $1,500 attorney's fees and court costs and to pay her support in the amount of $350 per montn for a period of two years.

REASONS FOR GRANTING THE WRIT

There are now 22 States having some form of "no-fault" divorce.[1] Since fault for the breakup of the marriage is no longer a criterion for dissolution of the marriage, or connected with the granting of alimony, the question presented is: How can one person be compelled to support another when there is no longer any relationship between them? If there can be any basis or foundation for such order, (which, incidentally, can be enforced by imprisonment for contempt) should fault for terminating the relationship at least be considered by the Court? A federal question is clearly presented since the taking of property

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[1] States having enacted "no-fault" divorce laws are Alabama, Arizona, California, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Iowa, Kentucky, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Oregon, Texas, Vermont and West Virginia.

from one person and giving it to another requires due process of law. It is an important question since a growing number of states are passing "no-fault" type divorce laws and the issue will affect many lives and will probably be frequently presented until resolved by this Court.

ARGUMENT

I. A STATUTE COMPELLING ONE PERSON TO SUPPORT ANOTHER REQUIRES CONSTITUTIONAL SAFEGUARDS

This writer has not been able to find one case in which the Court has decided that the payment of alimony or spousal support is subject to the constitutional safeguards of due process. However, compelling one person to support another is certainly "the taking of one man's property and giving it to another" and is thus entitled to due process. *Ginsburg v. Lindel,* 107 F.2d 721, 726.

Furthermore, under California law, failure to pay alimony is grounds for contempt of court, *In re Pillsburg* (1924) 69 C.A. 784, 232 P. 725, and subject to imprisonment, *Miller v. Superior Court* (1937) 9 Cal. 2d 733, 72 P.2d 868. Also, cf. California Code of Civil Procedure, §1218. Therefore, the constitutional safeguards are obviously involved by implication, and if the violation of an order is subject to Constitutional safeguards, it stands to reason that the order itself must be valid. cf. 12 A.L.R. 2d 1059.

II. THE CALIFORNIA STATUTES REQUIRING A PERSON TO PAY SUPPORT TO A FORMER SPOUSE IS UNCONSTITUTIONAL

Under pre-1970 California law (existing at the time of the marriage of these parties) in the absence of an agreement, finding of fault was essential before an award of alimony could be made. California Civil Code §139, now repealed, stated that:

> ". . . 'the Court may *compel* the party *against whom* the decree or judgment is granted to make such suitable allowance for the support of the other' . . ." (Emphasis supplied.)

This was interpreted to mean that a guilty wife could receive permanent alimony only if she was granted a divorce against a husband who was also guilty of marital fault. *Mueller v. Mueller* (1955) 44 C.2d 527, 282 P.2d 869. *De Burgh v. De Burgh* (1952) 39 C.2d 858, 250 P.2d 598. Where incurable insanity was the ground, alimony could be awarded against the "guilty" spouse. Civil Code §108, now repealed. Where only the husband was granted the divorce, an alimony award to the wife was unauthorized. *Brooks v. Brooks* (1942) 53 C.A. 2d 93, 127 P.2d 298; *Smalley v. Smalley* (1959) 176 C.A. 2d 374, 1 Cal. Rptr. 440.

In theory, alimony was considered to be compensation to the injured spouse for the loss resulting from the other's breach of the obligations of the marital relationship. *Hall v. Superior Court* (1955) 45 C.2d 377, 289 P.2d 431.

Under the new law, evidence of specific acts of misconduct are no longer admissible, except when relevant to an issue of child custody. California Civil Code §4509. There

is no evidence or finding of "marital fault" so obviously there can no longer be any compensation to an "injured" spouse.

The problem of an allowance of permanent alimony to a wife against whom a divorce was granted is covered in considerable detail in 34 A.L.R. 2d 313. An examination of that article reveals that not a single state has yet ruled on the constitutionality of the subject.

What is the objection from a Constitutional standpoint?

The 14th Amendment to the United States Constitution prohibits the taking of property without due process of law. If one person is compelled to support another, obviously he is being deprived of "property". Thus, your petitioner now asks the question, "Upon what basis is the court directing me to support my *ex*-wife?"

The opinion of the Court of Appeal does not meet the issue.[2] The Court points out that under *DeBurgh v. DeBurgh* (1952) 39 C.2d 858, the party against whom a judgment had been granted could still be entitled to an award of permanent support if the Court used the device of awarding each party a divorce. However, a divorce was still granted *against* the person required to pay support.

"The advantage of dual divorce decrees is significant in the light of the Civil Code, which provides that '. . . the Court may compel the party against whom the decree or judgment is granted to make such suitable allowance for support and maintenance of the other party . . .' The dual divorce

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[2] Parenthetically, the opinion of the Court of Appeal stated that petitioner's constitutional objection was "punishment without any legal reason." This statement is erroneous and the error was pointed out to the court upon a petition for re-hearing, which petition was denied without comment.

serves to allow the Court greater freedom in awarding alimony. In dual divorce, each party is literally a 'party against whom the decree is granted'." (Citing former California Civil Code §139.29 Southern California Law Review 244.)

The opinion of the Court of Appeal stated, "Furthermore, under former section 139 it was held that support should not be awarded as a penalty for the *degree* of fault giving rise to the grounds for divorce." (*Cardew v. Cardew* (1961) 192 Cal. App. 2d 502, 509.)

Your petitioner pointed out in his Petition for a Rehearing before the Court of Appeals that a closer examination of the *Cardew* case revealed:

1. The case stated, "In theory, alimony is considered to be compensation to the injured spouse for the loss resulting from the other's breach of the obligations of the marital relationship." Thus fault was considered.

2. The statement of the *Cardew* decision cited by this Court was within a different context. The issue presented to the *Cardew* Court was whether certain evidence should have been admitted. Appellant had claimed that the evidence should have been admitted to demonstrate the *amount* of alimony she should receive. (P. 508) The Court then pointed out that *comparative* fault is considered, but once the comparative fault was utilized to determine *whether* a divorce should be granted to both parties, it had fulfilled its function. Thereafter, as stated in *Whitney v. Whitney*, 164 Cal. App. 2d 577 (cited in *Cardew*) the amount of support

is not considered as punitive damages in relation to the degree of cruelty.

This is a long way from the present situation where there is *no fault.* The Court pointed out that the *dissolution* of the marriage could be granted without fault and the granting of such dissolution without fault was held to be constitutional. *In re Marriage of Walton* (1972) 28 Cal. App. 3d 108. This is not challenged. It is the award of support without fault, or other basis, that is being challenged.

The opinion then went on to say, "Thus, since it has already been held constitutional for the state to provide that a dissolution of a marriage shall not be based on fault, the state may provide for the award of spousal support taking into consideration the circumstances of the respective parties," citing *In re Marriage of Siegel* (1972) 26 C.A. 3d 88, 92. Petitioner respectfully submits that nothing in the *Siegel* decision touched upon any constitutional issues.

Thus, we are still faced with the problem of the lack of any basis for an order directing a person to support an ex-spouse.

To be sure, while married, such support makes sense because of the relationship of the parties. But now there is no longer any relationship except "ex." They have each taken out of the marriage their separate property and own share of the community property. Their relationship is terminated and they can go their separate ways. No longer are they living or sleeping with one another. Indeed, they may each be living with other persons.

What criteria do we now use? What obligations does the recipient have toward the donor of her livelihood? If need is the sole criterion, then what does this have to do with

the marriage relationship? After all, there are many needy people around, so why shouldn't they all be permitted to sue the richer ones for support? Furthermore, nothing in the present record indicates "need" on the part of the ex-wife.

The only way the duration of the marriage criterion makes sense is to say that, in effect, we are "rewarding" the recipient for longevity of service. But then should the quality of the service also not be examined? And should circumstances of bringing about the dissolution not also be examined, bringing us right back to the issue of fault?

Your petitioner recognizes that obviously there are social reasons for support under certain circumstances.

For example, a woman who has been married for a considerable period of time should not be left destitute upon the whim of her husband who now seeks greener pastures. But on the other hand, it is just as wrong to compel a man to support his former wife if she is living with someone else. And in the present case, for example, a marriage of less than two years duration, when a 23 year old, healthy girl walks out with $10,000.00, surely she should not have a free ride for another two years.

What is the alternative, then? That we continue to have a "no-fault" system for dissolution of marriage, but if a spouse wants to be supported, the Court examine *all* of the circumstances, including the reason for the breakup of the marriage. Another alternative could be a support schedule wherein an exact amount of support, based upon income, duration of marriage, etc., is set forth. Then, at least a person knows the extent of his obligation. In other words,

either the trial Court is given *full* discretion or *no* discretion.

Your petitioner does not mean to be presumptuous in offering these alternatives. They are pointed out solely to demonstrate that there are alternatives available which would be fair to all concerned. The present situation is extremely unfair.

Thus, your petitioner respectfully submits that this Petition for a Writ of Certiorari should be granted.

Dated, San Francisco, California, November , 1973.

Respectfully submitted,

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